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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ALBERT VALENZUELA,

Defendant and Appellant.

E053963

(Super.Ct.No. FSB1100786)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster,
Judge. Affirmed with directions.

Neil Auwarter, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Garrett Beaumont and Sharon L.
Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Jesus Albert Valenzuela
pled nolo contendere to one count of receiving stolen property. (Pen. Code, § 496,

subd. (a).)¹ The trial court placed him on probation for a period of three years under specified terms, including 180 days in jail.

On appeal, defendant contends: (1) the trial court should have awarded him presentence conduct credits; and (2) the trial court erred in imposing certain gang-related probation conditions, since there was no evidence he was involved in a criminal street gang. The People concede, and we agree, that the court should have awarded defendant conduct credits. The matter is remanded for the court to award such credits. Otherwise, we affirm.

FACTUAL BACKGROUND²

On December 23, 2010, several items of personal property, including two guitars, were stolen from the victim's residence. Two days later, the victim contacted the police after discovering that some of the stolen items were posted for sale on eBay. The items had been posted by a pawnshop. The owner of the pawnshop told the police that defendant sold the property to him. When questioned by the police, defendant said he bought the items from a third party and decided to sell them to a pawnshop. Defendant said he did not know the items were stolen.

The probation officer's report states that defendant admitted he was a documented member of a tagging crew.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² These facts are taken from the probation officer's report.

I. The Court Should Have Awarded Defendant Presentence Conduct Credits

The trial court sentenced defendant to 180 days in county jail, with credit for time served of 40 days. The court failed to address conduct credits. Nonetheless, the minutes from the sentencing hearing state that the court gave him “credit for time served, a matter of 40 days, plus conduct credit pursuant to PC4019.” Defendant contends that the sentencing court should have awarded both actual custody credits and conduct credits. The People correctly concede. (See *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1469, fn 9.)

The California Supreme Court has stated that the trial court imposing a sentence has the responsibility to calculate the exact number of days the defendant has been in custody prior to sentencing, add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30; see also § 2900.5, subd. (d) [the sentencing court is required to determine the number of days of custody and any conduct credits earned pursuant to § 4019].)

The trial court here did not award defendant any presentence conduct credit. It did not deny him the credit either, but left the issue unresolved. It was the trial court’s duty to calculate these credits as required by section 2900.5. Defendant is entitled to have the trial court undertake this housekeeping matter. We will order further proceedings accordingly.

II. The Court Properly Exercised Its Discretion in Imposing Gang-related Probation

Condition Nos. 25 and 29

Defendant contends that the court erred in imposing probation condition Nos. 25 and 29, since there was no evidence that he was involved in a criminal street gang. Condition No. 25 requires him to report to the gang detail of the local police department with a copy of his probation terms within 14 days from his release from custody. Condition No. 29 prohibits him from appearing at any court building, unless he is a party, defendant, or has been subpoenaed as a witness to a court proceeding. Defense counsel objected to the imposition of gang-related conditions, but the court imposed them on the ground that defendant had been documented as a member of a tagging crew, and the conditions went toward preventing future criminality. We agree with the trial court.

Pursuant to section 1203.1, subdivision (j), a court granting probation may impose “reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer, . . .” Courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) However, the trial court’s discretion in setting conditions of probation is not unbounded. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624 (*Lopez*).) A condition of probation is invalid if it ““(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future

criminality’ [Citation.]” (*People v. Lent* (1975) 15 Cal.3d 481, 486, italics added.)

“‘Probation is an act of clemency which rests within the discretion of the trial court, whose order granting or denying probation will not be disturbed on appeal unless there has been an abuse of discretion.’ [Citation.]” (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) Regarding gang conditions, it has been noted that association with gang members is the first step to involvement in gang activity, so gang conditions have been found to be “‘reasonably designed to prevent future criminal behavior.’ [Citation.]” (*Lopez, supra*, 66 Cal.App.4th at p. 624.) “[P]robationary proscriptions against gang-related conduct [have been found] equally proper when imposed upon adult[s] The path from gang associations to criminal gang activity is open to adults as well as to minors.” (*Id.* at p. 625.)

Defendant argues that both condition Nos. 25 and 29 fail the *Lent* reasonableness test because he is an adult convicted of a non-gang related offense, and there was no evidence that his tagging crew was involved in *felony* vandalism to qualify it as a criminal street gang, within the meaning of section 186.22. We disagree.

Probation condition No. 25 simply requires defendant to report to the local police agency gang detail with a copy of his probation conditions. It does not require registration as a gang member. It is a term that allows the local law enforcement agency to be aware of defendant’s probation status and help his probation officer ensure his compliance with his probation conditions. Consequently, this condition is reasonably related to future criminality and, thus, the trial court did not abuse its discretion when it imposed this condition.

Probation condition No. 29 prohibits defendant's presence at a court proceeding unless he is a party, defendant, or witness. This condition is related to gang association and potential intimidation of witnesses. (*In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1502.) Even though defendant was not currently in a gang, the propriety of gang terms does not turn on whether a defendant is currently involved in a gang. (*Lopez, supra*, 66 Cal.App.4th at pp. 624-625.) Furthermore, the court was concerned because defendant was a documented member of a tagging crew. It is recognized that a tagging crew can evolve into a criminal street gang. (See *People v. Hodgson* (2003) 111 Cal.App.4th 566, 569.) We conclude that this condition was a reasonable preventative measure for helping defendant to avoid associating with a gang and committing future crimes.

DISPOSITION

The matter is remanded for the trial court to calculate defendant's presentence conduct credits pursuant to section 4019. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

KING
J.